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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALTON A. KING,<br><br>Defendant and Appellant. | H032896<br>(Santa Clara County<br>Super. Ct. Nos. CC586674<br>and BB151848) |

Following a jury trial, appellant Alton King was convicted of one count of continuous sexual abuse of a child under 14 years in violation of Penal Code section 288.5, subdivision (a), count two (committed between August 23, 1993 and March 29, 1995 against victim D. Doe) and one count of committing a lewd and lascivious act on a child under 14 in violation of section 288, subdivision (a),[1] count three (committed between March 30, 1996 and April 6, 1996 against victim D. Doe).[2] As to both these counts the jury found true the allegations that during the commission of the offenses, appellant had substantial sexual contact with D. and that D. was under the age of 14 years within the meaning of section 1203.066, subdivision (a)(8); and as to count two, the

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1 All undesignated section references are to the Penal Code.

2 The jury was unable to reach a verdict on count one, lewd and lascivious act on a child (§ 288, subd. (a)) allegedly committed between August 23, 1993, and January 18, 1994, against victim C. Doe. The court declared a mistrial.

allegation that the complaint was filed within one year of the date of a report to law enforcement.

On April 25, 2008, the court sentenced appellant to state prison for 18 years consisting of the upper term of 16 years on count two, one-third the mid-term, two years, on count three, all to run consecutively to a 14-year, eight- month sentence that appellant was serving in connection with case No.BB151848.

Appellant filed a timely notice of appeal on April 30, 2008.

On appeal, appellant raises six issues. First, he contends that the judgment must be reversed because the predicate offenses on counts two and three were tried in an improper county. Second, the trial court erroneously permitted the prosecution to present evidence of alleged uncharged sexual conduct. Third, the trial court's charge to the jury improperly permitted the jury to find him guilty of the charged offenses based solely on his alleged propensity to commit such offenses. Fourth, the court erred in permitting testimony regarding Child Sexual Abuse Accommodation Syndrome. Fifth, he was denied his right to present a defense of financial motive on the part of the victim. Lastly, he was sentenced in violation of *Cunningham v. California* (2007) 549 U.S. 270 (127 S.Ct. 856).

For reasons that follow, we affirm the judgment.

*Facts and Proceedings Below*

On March 25, 2008, after several days of trial testimony, the Santa Clara County District Attorney filed a first amended complaint charging appellant with two counts of lewd and lascivious conduct on a child under 14 years of age (§ 288, subd. (a), victim C., count one and victim D., count three) and one count of continuous sexual abuse of a child under 14 years of age (§ 288.5, subd. (a), count two).[3]

[3] The information was amended to change the dates during which the events were alleged to have occurred.

The evidence adduced at trial follows; however, since the jury could not agree on count one, victim C., and the court declared a mistrial, we confine the statement of facts to events surrounding D.

*Prosecution Evidence*

*D.'s Mother*

In August 1993, just before the start of the school year, D., his brother C. and their mother moved to an apartment near their local Seventh Day Adventist Church. Beginning on August 23, 1993, the children attended the church's school (the Church School). Appellant and his family attended the same church and school as D.

Appellant used to see D. and his brother waiting at the bus stop and began giving them rides. Subsequently, appellant's family and D.'s family began to spend holidays together. In addition, the boys spent at least every other weekend, and sometimes, consecutive weekends at appellant's home.

D. and his brother were involved in a church-sponsored youth organization called Pathfinders. Pathfinders held weekly meetings, which began about 7 p.m. at the church. Pathfinders' activities included camping trips, an annual bike-a-thon, and jamborees.

D. and his family moved to Sacramento on December 26, 1996. In 2004, D.'s mother had a conversation with D.'s brother who disclosed to her that he had been molested by appellant. D.'s mother spoke with D. Eventually, D. admitted that appellant had molested him. D.'s mother called her sister and then reported the matter to the San Jose Police Department. D.'s mother said that she reported the matter, "Because we needed to stop him from getting to somebody else's child."

D.'s mother admitted that she had conducted an Internet search on appellant's name and discovered that appellant had been convicted of molesting other boys. She thought that she had read something on Google or heard something that some of the other boys that had been molested had received money from a lawsuit, but she was not sure whether it was before or after she reported that her boys had been molested by appellant.

*Victim D.*

D. attended the Church School from fifth through seventh grade, ages 11 through 13.[4] D. was the same age as appellant's twin children, J1 and J2, and was in the same class. D. confirmed that he was involved in Pathfinders and each week, on the day of the meeting, D. would go to appellant's home after school and then appellant would drive him and his brother to church for the evening meeting. Appellant was a lead counselor who chaperoned, transported children and helped out at events. Appellant nearly always drove D., his brother C., J1, and J2 to the weekly Pathfinder meetings.

At appellant's home, appellant routinely molested D. on the day of the weekly Pathfinders meeting, on the weekends when D. spent the night and on Pathfinder's camping trips. Appellant would fondle D.'s penis, orally copulate him, and on one occasion sodomized him. Sometimes, appellant would have D. orally copulate him.

D. testified that appellant molested him nearly every time they were alone. However, he described a number of specific instances of sexual abuse.

First, when D. was in fifth grade, he was playing video games alone while sitting on the edge of the bed in the loft playroom in appellant's home. The other children were playing basketball outside or watching television in another part of the house. D. was at appellant's house that day because there was a Pathfinders meeting that evening. Appellant climbed into the loft, appellant lay down on the bed behind him and started fondling him over his clothes. D. said that after about 10 minutes, appellant left to check on some food he was cooking. When appellant returned to the loft, he began to fondle D. again, but this time removed D.'s pants and orally copulated him until D. ejaculated.

D. described another incident in which appellant sodomized him. On that day, D.'s brother had stayed at school and appellant had taken his children to the orthodontist

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[4] The parties stipulated that D. commenced attending school on "August 23rd, 94." However, this appears to be a misstatement by the prosecutor because the stipulation then goes on "through June 2nd of '94."

and left them there before returning to his house with D. In the guest bedroom, appellant fondled and orally copulated D. After D. ejaculated, appellant went into the bathroom, returned with lotion, which he applied to D.'s anus, and then inserted his penis into D.'s anus. Appellant stopped after D. told him that it hurt. D. testified that since this incident, he is bothered by the smell of lotion because it "brings back bad memories."

D. recounted an incident that happened in Madera County, where the Pathfinders held their annual bike-a-thon (hereafter the Chowchilla incident). While the Pathfinder's leader, Mr. Tupper, played the guitar and lead the children in singing songs, appellant told D. to go to his "truck," a four door Ford Explorer. D. got into the back seat of the vehicle with appellant. Appellant looked around to see if anyone was coming, but did not appear worried. Appellant fondled D. and then orally copulated him until he ejaculated. Next, appellant removed his own clothing and had D. orally copulate him. D. noted that this was not the first time he had orally copulated appellant.

D. testified about an incident that happened in Napa County. This incident took place toward the end of D.'s second year at the Church School, during a Pathfinders' trip to Calistoga Park (hereafter the Calistoga incident). While hiking with the group, appellant pulled D. off to the side on a small trail and then orally copulated D. D. remembered this trip because afterwards he broke out with a poison ivy rash around his genitals and buttocks.

D. told the jury about another incident that he remembered happening at Mount Lassen. D. was staying in a tent with his brother and one other boy. Appellant entered the tent and pretended to tickle and wrestle with the boys, but actually grabbed D.'s genitals. As the boys were falling asleep, appellant pretended to be asleep, but after awhile, appellant started stroking D.'s penis.[5]

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[5] Witnesses testified at length regarding the timing of the Mount Lassen trip, which the prosecution alleged occurred shortly after D. and his brother joined Pathfinders in August of 1993. D.'s brother testified that he had been abused on this trip as well.

D. described an occasion when he was in sixth grade, which occurred after he and his brother had taken the bus home from school. Appellant called D. on the telephone, asked who was home with him and if his mother was there. D. told appellant that he was home with his brother. According to D., "[a]ll of a sudden, he was at the door." Appellant gave D.'s brother some money and asked him to go to the store to buy some sodas. Once D.'s brother left, appellant masturbated D. and then orally copulated him. When D.'s brother returned, appellant drank some soda and left quickly.

D. remembered another incident that occurred when he was in sixth grade that took place at church. In the 20 minutes between the end of Bible class and the church service, appellant pulled D. into one of the youth classrooms and locked the door. The room was "pitch black." Appellant directed D. to the back of the classroom, fondled D. under his clothes and as soon as D. had an erection, appellant undid D.'s belt, unzipped D.'s pants and orally copulated him.

According to D., when he was in seventh grade, appellant drove him to school regularly. On one occasion, appellant reached into the back seat of the car and at every red light fondled D. while pretending to tickle him. According to D., appellant's children were in the front of the car.

D. recounted another occasion that happened while he was in seventh grade that occurred at appellant's house on a Pathfinders' meeting day. D. was playing video games in the loft when appellant entered and began to fondle him over his clothing. After a short time, appellant went downstairs to check on something. When appellant returned to the loft, appellant began to fondle D. under his clothing and tried to remove D.'s pants.

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However, before trial the prosecutor informed the court that he would not use this incident as one of the incidents involving D. Rather, the prosecution elected to use the incident to establish a timeline and for propensity evidence. Accordingly, the parties stipulated that the "Mount Lassen incident will not be sought as a basis to convict the defendant on counts 1, 2, or 3."

D. refused, telling appellant that he did not want to do "it" anymore and that appellant should go and molest his own children. According to D., appellant told him that he did not do "it" to his own children. D. characterized appellant's demeanor after this incident as "pissed off." D. noted that appellant left abruptly and did not speak to him for the rest of the night.

After this incident, temporarily, appellant stopped molesting D. for three or four weeks. Eventually, appellant started again, but would give D. gifts or take D. to the store for ice cream or a soda.

D. described the next incident as having occurred in the loft area on the day of a Pathfinders' meeting. He was alone playing video games when appellant fondled D. by stroking D.'s penis. The following weekend, D. was at appellant's house where he was watching television in the den. The other children had finished watching television and left the room. Appellant entered the room, fondled D., orally copulated him until he ejaculated and then left the room.

D. recalled another occasion that happened before a Pathfinders' meeting just after he used the bathroom near the guest bedroom in appellant's house. Appellant appeared in the bedroom, fondled D., orally copulated D. and then had D. orally copulate him. D. remembered this incident because after it was over appellant gave him $25.

D. testified that there were many occasions during which appellant would wrestle with him and his brother and grab their genitals. On one occasion, appellant's wife walked in during the wrestling and D. thought "She wasn't happy about it."

D. never spoke to his brother about having been molested, but he did have suspicions that his brother was being molested also.

Appellant ceased molesting D. about one and a half months before D. and his family moved to Sacramento. The last time that appellant fondled and orally copulated D. while in the loft, appellant told D. not to tell anyone about the abuse because D. would be the one who would be in trouble.

*1108 Evidence*

*Andre Doe*

Andre testified that during his freshman year at school he played football. He knew appellant when appellant was a chaperone at a football tournament. One night during the tournament, while sleeping in the choir room at the Fresno Adventist Academy, after the lights were turned out, he was awakened by a hand grabbing his penis over his clothing. Initially, he did not see who had done it, but then he was awakened a second time by someone touching his penis.[6] Andre saw appellant on the floor in close proximity to him. Appellant had not been there when Andre awoke the first time. Andre told appellant he needed to speak to him and they "stepped out to a separate room outside of the sleeping area."

Andre asked appellant what he was doing and appellant would not give him an answer. Eventually, appellant told Andre that since he was a doctor, he needed to perform an examination on Andre "because of a deformity that happens to [H]ispanics in their penis." Andre did not want appellant to do anything, but finally appellant convinced him to let him do it. Appellant pulled down Andre's shorts, and masturbated Andre's penis. Andre told appellant to stop and appellant pulled away. Two other students entered the room and asked Andre if he was "doing fine." Andre said yes and went back to sleep. He told appellant to stay away.

*John Doe*

John testified that he knew appellant through his church and first met appellant in 1997 at a church camp in Soquel. John came to know appellant's son and daughter through school as well as church. John explained that in 1997 he would have been going

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[6] Andre described the touching as an up and down motion on the shaft of his penis.

into eighth grade and had classes in common with appellant's son and daughter. John was invited to go to appellant's house, usually after school. Sometimes he would spend the night.

John described an incident that happened at the end of 1998 when appellant asked him to pull down his pants to check how he "was doing physically down there in the groin area." John was under the impression that appellant was a doctor. Appellant started touching and "groping" John. Specifically, appellant touched John's penis and testicles for about a minute. John was 15 years old at this time.

John described a second incident that happened in 1999 at a church camp in Soquel. Again, appellant said that he wanted to examine John. Eventually, after appellant persisted, John went into a tent with appellant. After John pulled down his pants appellant started touching him again. John described the touching as "masturbating" him. At the time appellant was "[m]aking kind of sighs, moaning sounds, grunting . . . ."

John explained to the jury that there was a third incident that happened at appellant's house in the closet where a computer was located. John was sitting at the computer when appellant reached for John's groin area "kind of playing around" and "kept asking [John] to show him." John unzipped his pants, pulled down his boxer shorts and appellant started feeling him in the groin, specifically his penis and testicles. After about a minute, John pulled up his pants and left.

John described other occasions when he would be staying at appellant's house when he was sleeping in the top bunk in J1's room. Appellant would come up and ask John to show him his genitals or appellant would grab John in the groin area. Near the end of 2000, John stopped going to appellant's house because he did not feel comfortable going there anymore.

*Jordan Doe*

Jordan testified that he knew appellant both through church and school. Jordan spent the evening and stayed overnight at appellant's house. Appellant made sexual advances towards Jordan on more than one occasion. Jordan remembered the first incident occurred in the living room of appellant's house. Appellant was watching television when he had Jordan sit down next to him. They started talking about appellant being a doctor and appellant asked Jordan when he had last had a check-up. Jordan said that it had been awhile. Appellant said he "could help . . . out with that." Appellant persisted until Jordan gave in; the physical consisted of Jordan pulling down his pants and appellant masturbating him. Jordan was 13 years old at the time of this incident.

Jordan recalled a second incident that happened at the church camp in Soquel. While they were cleaning up on the last day of the camp, appellant pulled Jordan into an empty tent and proceeded to give him a "physical exam" that consisted of appellant masturbating him.

A third incident occurred on a school sponsored choir trip in the spring of 2000 when Jordan was 14 years old. They were staying at the Motel 6. Jordan was watching television in his room when appellant came in. Jordan decided that it was time to go to bed, but his friend was in his bed. Appellant told Jordan that he could spend the night in his room. Although Jordan did not want to go to appellant's room, appellant persisted and eventually Jordan went with appellant. Once they got to appellant's room, appellant gave Jordan "another physical examination" that consisted of appellant masturbating him until he ejaculated.

Jordan described a fourth incident that happened in appellant's guest room a few months after the previous incident. Again, appellant masturbated him and started to engage in oral sex with Jordan until Jordan pushed him away.

Finally, Jordan recalled an incident that happened in Colorado on another school sponsored choir trip. While they were staying at a motel/lodge, Jordan went to appellant for some advice about a girl. Appellant ended up masturbating Jordan.

The prosecution introduced evidence that appellant was convicted in 2002 of molesting John Doe in November 1999 and Jordan Doe between July 1999 and October 2000. After appellant testified, the prosecution introduced evidence of appellant's convictions of sexual abuse of three additional Doe victims—a second John, Steven, and Christopher, for abuse that occurred between September 1998 and November 2000.

*Child Sexual Abuse Accommodation Syndrome*

Carl Lewis, a senior investigator from the Santa Clara County District Attorney's Office, testified as an expert in Child Sexual Abuse Accommodation Syndrome (CSAAS). The court instructed the jury with CALCRIM No. 1193[7] concerning the limited purpose for which the jury could consider the evidence. Mr. Lewis reiterated that CSAAS evidence does not prove that sexual abuse has occurred.

*The Defense Case*

Appellant testified in his own defense that the victims were untruthful and that they were motivated to falsely report abuse in order to recover civil damages. Appellant claimed that he did not pick up D. and his brother after school to go to Pathfinder meetings, or at least until 1995. He was not a member of the Pathfinders and was too disabled to take trips with Pathfinders or climb into the loft where D. claimed he was molested.

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[7] CALCRIM No. 1193 as given here provides, "You have heard testimony from Carl Lewis regarding child sexual abuse accommodation syndrome. [¶] Carl Lewis' testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [C.] or [D.] . . . 's conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of his testimony."

Appellant admitted his prior convictions for molesting other victims and for embezzlement. In addition, he admitted he orally copulated Jordan, and molested John and Steven at his home. Appellant said that he misrepresented himself as a doctor in order to molest his victims.

In rebuttal, the prosecutor played the tape of an interview that appellant gave to police in which appellant stated that D. and his brother were dependent upon him for rides and acknowledged transporting them to Pathfinders' meetings and on weekend trips.

*Discussion*

*Improper Venue*

Appellant contends that his convictions on counts two and three must be reversed because the prosecution relied on alleged offenses that took place outside Santa Clara County i.e. Madera and Napa Counties. For two separate reasons, we reject appellant's contention.

During trial, defense counsel filed a motion to exclude the jury from convicting appellant based on the out of county incidents—as relevant here, the Chowchilla incident and the Calistoga incident. The court denied the motion.

The prosecution relied on section 781[8] and 784.7 in support of its position that Santa Clara County was a proper venue. Defense counsel pointed out that section 784.7 had no application to this case because it was not in force at the time of appellant's offenses, thus, since "jurisdiction" did not exist in Santa Clara County at the time the incidents were alleged to have occurred, section 784.7 could not be used as a basis to punish him criminally.

[8] Section 781 provides, "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

Section 784.7, subdivision (a) provides, "When more than one violation of Section 220, except assault with intent to commit mayhem, 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to a hearing, pursuant to Section 954, within the jurisdiction of the proposed trial. At the Section 954 hearing, the prosecution shall present evidence in writing that all district attorneys in counties with jurisdiction of the offenses agree to the venue. Charged offenses from jurisdictions where there is no written agreement from the district attorney shall be returned to that jurisdiction."[9]

Citing to *Lindsey v. Washington* (1937) 301 U.S. 397 (57 S.Ct. 797), appellant raises the issue of improper venue again in this court.[10] He argues that he has a "right" to be tried in the proper venue.

In *Lindsey v. Washington, supra,* 301 U.S. 397, the Supreme Court considered a Washington law whereby, at the time of the offense, a defendant's term could have been set at any period up to 15 years. At the time of sentencing, the law had been amended to provide for an indeterminate 15-year term. The Supreme Court noted that "The effect of the new statute is to make mandatory what was before only the maximum sentence." (*Id.* at p. 400.) Although, the high court went on, "It is true that petitioners might have been sentenced to fifteen years under the old statute" (id. at p. 401), the court continued, however, "the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the

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[9] The prosecution present letters from the District Attorney of Napa County and the District Attorney of Madera County to the court in which each one agreed that the offenses that were alleged to have occurred in their county could be tried in Santa Clara County.

[10] We glean from appellant's reference to *Lindsey v. Washington*, *supra*, 301 U.S. 397 that he is making an ex-post facto challenge to the use of section 784.7 at his trial.

application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." (*Ibid.*)

"To fall within the *ex post facto* prohibition, a law must be retrospective-that is, 'it must apply to events occurring before its enactment'-and it 'must disadvantage the offender affected by it' [citation], by altering the definition of criminal conduct or increasing the punishment for the crime [citation]." (*Lynce v. Mathis* (1997) 519 U.S. 433, 441 [117 S.Ct. 891].) The ex post facto clause regulates increases in the *quantum* of punishment. (*Id.* at pp. 443-444.)

Similarly, as the California Supreme Court noted in *People v. Sandoval* (2007) 41 Cal.4th 825, 853, "A law violates the ex post facto clause only if it is retroactive-that is, if it applies to events occurring before its enactment-and if its application disadvantages the offender. [Citation.] A retroactive law does not violate the ex post facto clause if it 'does not alter "substantial personal rights" but merely changes "modes of procedure which do not affect matters of substance." ' [Citation.]" Appellant does not make any claim that he was disadvantaged by being tried in Santa Clara County for incidents that occurred in Napa or Madera Counties. Nor does he claim that by being tried in Santa Clara County the quantum of punishment was somehow increased.

First, we point out that "[e]ven though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future. This is a principle that courts in this state have consistently recognized. Such a statute ' "is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citations.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' [Citation.]" (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) Thus, "a law governing the conduct of trials is being applied 'prospectively' when it is applied to a trial occurring after the law's effective date,

regardless of when the underlying crime was committed or the underlying cause of action arose." (*Id*. at p. 289.)

Second, "venue is a procedural question involving the appropriateness of a place for a defendant's trial on a criminal charge, and not a substantive question relating to the defendant's guilt or innocence of the crime charged." (*People v. Posey* (2004) 32 Cal.4th 193, 200.) The venue statute-section 784.7- does not alter the definition of criminal conduct or increase the punishment for a crime.

"Traditionally, venue in a criminal proceeding has been set, as a general matter, in the county or judicial district in which the crime was committed. Under the provisions of Penal Code section 777, that continues to be the general rule in California. That statute provides in part: '[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed.' " (*People v. Simon* (2001) 25 Cal.4th 1082, 1093-1094 (*Simon*).)

Nevertheless, "[a]lthough under section 777 the county in which a felony was committed is, in the absence of another statute, the locale designated as the place for trial, in California numerous statutes-applicable to particular crimes or in specified circumstances-long have authorized the trial of a criminal proceeding in a county other than the county in which the offense itself occurred. Thus, for example, section 786 has provided, since the original enactment of the Penal Code in 1872, that when property taken by burglary, robbery, theft, or embezzlement in one county has been brought into another county, the trial of the initial burglary, robbery, theft, or embezzlement offense may be held in either county. Similarly, section 783 long has provided that when a criminal offense is committed on a railroad train, a boat, a common carrier, or in a motor vehicle in the course of 'its voyage or trip,' the offense may be tried in any county 'through, on, or over which' the vehicle passed in the course of the trip or voyage, without regard to the specific location where the offense occurred." (*Simon*, *supra*, 25 Cal.4th at p. 1094.)

Accordingly, as long as a statute provides for a trial to be in a county other than the one in which the crime was committed, a defendant has no "right" to be tried in the locale of the crime. A change of venue may be ordered by the court in a criminal case under appropriate circumstances. (*Simon*, *supra*, at p. 1097.) "[V]enue for trial implicates legislative policy, not constitutional imperative, the Legislature may determine the venue for trial except to the extent the vicinage or due process provisions of the state or federal Constitution circumscribe that authority." (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1056 (*Price*).)

"The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to be tried 'by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' Article I, section 16 of the California Constitution . . . has been construed as implicitly reserving a similar, but not necessarily coextensive, vicinage right." (*Price*, *supra*, 25 Cal.4th at p. 1050.) In *Price*, the California Supreme Court concluded that section 784.7 does not violate either the vicinage clause of the Sixth Amendment or Article I, section 16 of the California Constitution. (*Ibid*.)

Accordingly, we reject appellant's contention that his convictions on counts two and three must be reversed because they were tried in an improper venue. Since we have concluded that Santa Clara County was a proper venue in which to try appellant under section 784.7, we need not decide whether Santa Clara County was a proper venue under section 781.

*1108 Evidence of Uncharged Sexual Conduct*

The prosecution moved in limine to admit the testimony of 10 victims of appellant's sexual abuse as propensity evidence under Evidence Code section 1108 and to demonstrate intent under Evidence Code section 1101. In 2002, appellant was convicted of sexual offenses involving five of the proposed witnesses. All the proposed witnesses were molested while they attended a church-run school where appellant was a volunteer

basketball coach. Appellant moved to exclude this evidence under Evidence Code section 352. At the hearing on the prosecution's motion to admit this evidence, appellant objected to the admission of the testimony by three proposed witnesses whose allegations of abuse did not result in a conviction.

After a lengthy weighing of the factors it had considered, the court ruled that it would permit testimony of seven of the proposed witnesses under both Evidence Code section 1108 and Evidence Code section 1101 to show intent. Finally, the trial court ruled that if appellant testified, it would allow evidence of all appellant's convictions for purposes of impeachment. As noted, appellant did testify and evidence of his prior convictions was admitted.

Appellant contends that the trial court erred in permitting the prosecutor to introduce evidence of his propensity to molest boys consisting of uncharged acts of sexual conduct. In particular, appellant claims that the acts offered to show propensity were too dissimilar to the offenses being tried and were prejudicial since they occurred after his abuse of D.

We set forth in detail the trial court's Evidence Code section 352 analysis.

The court stated that it "should and has considered such factors as the nature, relevance, possible remoteness, the degree of certainty of its commission, and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offenses, its likely prejudicial impact on the jurors, the burden on the defendant defending against the uncharged offenses, and the availability of less prejudicial alternatives to its outright admission."

Before reciting the facts pertaining to each individual witness, the trial court recounted the facts that made the victims' testimony particularly probative.

"The charged offenses involve two brothers with the conduct occurring when they were between the ages of 11 and 14 years old. The uncharged misconduct involved young boys between the ages of 14 and 17 years old. All the charged offenses and the

uncharged misconduct involved at least the defendant touching the teenage boys on their penis with either his mouth or his hand. All the young boys knew the defendant and had some type of relationship with him. [¶] The uncharged misconduct specifically involve[ed] Jordan Doe, Christopher Doe, John Doe, John Doe II, Andre Doe, David Doe, and Steve Doe. The sexual misconduct involving these seven young men and the charged offenses are of the similar type and relevant. All the prior uncharged misconduct involving the individuals I just named are not remote. [¶] Allowing Jordan Doe, Christopher Doe, John Doe, John Doe II, Andre Doe, David Doe, and Steve Doe to testify will not result in an undue consumption of time. [¶] Concerning the certainty of the commission of the prior uncharged misconduct, there are convictions as to the conduct involving Jordan, Christopher, John, Steve, and John Doe II. Concerning Andre and David Doe, they are all clearly percipient witnesses and alleged victims of these incidents, and they will provide testimony of the sexual misconduct."

The trial court went on to recount some of the "facts and circumstances" pertaining to the proposed witnesses. The court noted that each was a teenage boy and that the abuse had involved appellant masturbating them.

Ultimately, only Jordan, John, and Andre testified. Jordan and John were the victims of offenses of which appellant was convicted. Andre was the victim of offenses for which there was no conviction.

As to Jordan, John and Andre, the court made the following observations.

"Jordan Doe was initially 13 when the misconduct started. It occurred at the defendant's house. Defendant indicated he wanted to do a checkup on Jordan. Defendant masturbated Jordan, rubbing his penis a number of times at his house. This also occurred on camping trips. [¶] One occasion, the defendant was a chaperone on a music tour, and masturbated Jordan's penis when Jordan became 14 at a motel. He indicated he was going to do a checkup and masturbated Jordan once again. This conduct also occurred at the defendant's house with the defendant rubbing Jordan's penis, at least one occasion

orally copulating him. [¶] As I already mentioned, as a result of his conduct the defendant was convicted of 288(a), 288(c)(1), and 288(a)(b)(1). . . . [¶] Concerning [the conduct involving] John Doe[], at the time of his conduct he was 15 years old. Once again, the defendant acts as a doctor. He said he was a doctor, touches the victim's penis. During a camping trip, he masturbated the victim a number of times. This also occurred in the defendant's house. As a result of this conduct, the defendant was convicted of 288(c)(1). [¶] Concerning Andre Doe, Andre Doe was 14 years old when this conduct occurred. Apparently, the defendant touched the victim's penis and also masturbated him."

Thereafter, the trial court ruled that under the same analysis, it would permit admission of the testimony under Evidence Code section 1101, subdivision (b) to show intent.

At the outset, we note that appellant appears to mount a due process challenge to Evidence Code section 1108. He argues that "admission of the 'propensity' evidence violated [his] state and federal due process rights."

At the time of appellant's trial, Evidence Code section 1108 provided in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Added by Stats.1995, ch. 439, § 2, p. 3429.)

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta* ), certiorari denied *sub nomine Falsetta v. California* (2000) 529 U.S. 1089, the California Supreme Court explained that although evidence of a criminal's propensity had long been excluded in this state, such "long-standing practice does not necessarily reflect a *fundamental,* unalterable principle embodied in the Constitution." (*Id*. at p. 914.) Furthermore, a rule permitting admission of such evidence does not offend those fundamental due process principles. (*Id.* at p. 915.) This is so because "the trial court's discretion to exclude

propensity evidence under [Evidence Code] section 352 saves [Evidence Code] section 1108 from [a] defendant's due process challenge." (*Id.* at p. 917.)

Appellant acknowledges that Evidence Code section 1108 has withstood constitutional challenge,[11] however, he argues that in order for the uncharged offenses to be deemed probative they must bear " 'meaningful similarity' " to the current offenses.

In the course of analyzing Evidence Code section 1108, *Falsetta* explained: "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Falsetta, supra,* 21 Cal.4th at p. 917.)

A trial court enjoys broad discretion in making an Evidence Code section 352 determination and it will not be disturbed on appeal except on a showing that such discretion was exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Appellant argues that the evidence in this case should have been excluded because it was unduly prejudicial. Appellant asserts that uncharged offenses must reasonably tend to prove the charged offenses; and crucial to this determination is the similarity and temporal remoteness between the charged and the uncharged conduct.

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[11] We are bound by that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As to appellant's argument that the dissimilarities between the charged and uncharged conduct "vastly overshadowed" the similarities, we note that "[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41, fn. omitted.)

The fact that in the uncharged offenses appellant utilized the ploy of posing as a medical practitioner in order to secure the cooperation of his victims does nothing to detract from the probative nature of the evidence. In fact, it demonstrates that appellant was becoming more sophisticated in his approach to how he secured their cooperation.

As to appellant's argument that the uncharged offenses were robbed of their probative value because they were committed after the charged offenses, *People v. Medina* (2003) 114 Cal.App.4th 897 (*Medina*) held that acts of sexual molestation which occur after the charged offenses are admissible as propensity evidence under Evidence Code section 1108. (*Id*. at p. 903.) As the *Medina* court explained, "The plain language of Evidence Code section 1108 does not limit evidence of uncharged sexual offenses to those committed *prior* to the charged offense. On the contrary, the statute broadly states that evidence of the 'defendant's commission of *another* sexual offense,' is not made inadmissible by the prohibition on the introduction of character evidence contained in Evidence Code section 1101. (Evid. Code, § 1108, subd. (a), italics added.) This language strongly suggests that evidence of an uncharged sexual offense committed after the charged offense is within the scope of section 1108." (*Medina, supra,* at p. 902.) Propensity is an inference drawn from the nature of the conduct, not from the sequence of the events. (*Id*. at pp. 903-904.)

Appellant's argument fails to acknowledge that Evidence Code section 1108 "is not limited to evidence that establishes a *pre*disposition on the part of the defendant to

commit a sexual offense. Rather, it permits evidence of the defendant's commission of 'another sexual offense or offenses' to establish the defendant's *propensity* to commit sexual offenses." (*Medina, supra,* 114 Cal.App.4th at p. 904.)

To the extent appellant complains the jury may have been inclined to punish him for his prior crimes, we presume the jury followed the instructions that plainly directed that they refrain from so doing. (*People v. Frazier, supra*, 89 Cal.App.4th at pp. 40-42.)

We find this case distinguishable from *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), cited by appellant. In *Harris,* the defendant was a mental health nurse, who was charged with several sex offenses and "accused of preying on women who were vulnerable due to their mental health condition." (*Id.* at p. 730.) At trial, evidence was presented regarding the events leading to the defendant's prior burglary conviction. (*Id.* at p. 734.) That evidence "described a viciously beaten and bloody victim who as far as the jury knew was a stranger to the defendant," and which the Court of Appeal found to be "inflammatory *in the extreme*." (*Id.* at p. 738.) In contrast, the charged sex crimes involved "a breach of trust by a caregiver" and the court determined that "the abuse the victims suffered" was "unfortunately, not unusual or shocking." (*Ibid.*) The court concluded that the prior offense evidence "was remote, inflammatory and nearly irrelevant and likely to confuse the jury and distract it from the consideration of the charged offenses." (*Id.* at p. 741.)

In this case, as the trial court explained, appellant's other sex offenses were similar in circumstance such that they were highly probative and relevant to the charged offenses, and the amount of time between the charged offenses and the subsequent uncharged offenses (3-5 years) did not eliminate the probative value of the uncharged offenses. Appellant admitted to committing some of the uncharged offenses and thus the likelihood of juror confusion was reduced. Some aspects of the testimony regarding appellant's charged sex offenses (sodomy in particular) were far more serious than the

uncharged offenses, making the uncharged offenses far less inflammatory than the charged offenses.

Accordingly, we find that the trial court did not abuse its discretion under Evidence Code sections 1108 and 352 in allowing evidence of appellant's other sex offenses.

As to appellant's argument that the trial court erred in admitting the testimony of Jordan, John and Andre under Evidence Code section 1101, subdivision (b) as evidence of intent, we note that the least degree of similarity between the uncharged offenses and the charged offenses is required to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) All that is required is that the uncharged misconduct "be sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance.' " (*Ibid.*)

As the California Supreme Court noted in *Ewoldt, supra,* 7 Cal.4th 380, " '[t]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' " (*Id.*, at p. 402.)

Viewing the evidence in the light most favorable to the trial court's ruling, the charged and uncharged offenses displayed common features—the nature of the acts, the location of the abuse, the age and gender of the victims and their association with appellant's church and the school attended by his children— amply support the inference that appellant harbored the same wrongful sexual intent toward the victims in each instance.

Accordingly, we find no abuse of discretion in the trial court admitting the evidence of uncharged conduct under Evidence Code section 1101, subdivision (b) to show intent.

*CALCRIM No. 1191*

Appellant contends that the trial court incorrectly instructed the jury with CALCRIM No. 1191 on how to consider the evidence of the uncharged offenses. Appellant claims that the instruction permitted the jury to find him guilty of the charged offenses based solely upon his alleged disposition to commit such offenses.

In this case the court instructed the jury pursuant to CALCRIM No. 1191 as follows:

"The People presented evidence that the defendant committed the crimes of lewd are [*sic*] lascivious act on a child under 14 years in violation of Penal Code section 288(a); oral copulation with a minor in violation of section 288(a) subdivision (b)(1); lewd or lascivious act on a child age 14 or 15 in violation of Penal Code section 288(c)(1), and sexual battery of a victim in violation of Penal Code section 242-243.4, subdivision (a), that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant, in fact, committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision also conclude that the defendant was likely to commit the sexual offenses alleged in counts 1, 2 and 3 as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not . . . sufficient by itself to prove that the defendant is guilty of the crimes charged in counts 1, 2 or 3. The People must still prove each element of every charge beyond a reasonable doubt. [¶] Do not consider this

evidence for any other purpose except for determining the defendant's credibility and whether the defendant had the intent or mental state as instructed in CALCRIM 375 . . . ."

Appellant concedes that the instruction advises the jury that a defendant's guilt on the uncharged offenses is not sufficient by itself to convict a defendant of the charged offenses. However, appellant argues that no such language appears as to a defendant's "disposition." That is, the language does not make it clear that a defendant's "disposition" to commit acts of sexual misconduct is not sufficient by itself to find a defendant guilty of the crimes charged beyond a reasonable doubt.

Thus, appellant asserts, under the charge in this case, in which the jury learned of an alleged uncharged offense in appellant's background, the jury was permitted to disregard the presumption of innocence, and was permitted instead to infer guilt based on inferences about the defendant's character and the fact that he has been accused again of some crime.

The Attorney General argues, as a threshold matter, that appellant failed to object to the instruction and thus forfeits this claim on appeal. Nevertheless, we point out that Penal Code section 1259 provides that "the appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

If the instruction does disregard the presumption of innocence as appellant argues then his substantial rights were affected. Accordingly, we review his claim on the merits.

In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the California Supreme Court held that the 1999 version of CALJIC No. 2.50.01 was constitutional. The version of CALCRIM No. 1191, given to the jury in this case, contains substantially similar language to that in the version of CALJIC No. 2.50.01 which was approved by the Supreme Court in *Reliford.* "The version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to CALCRIM No. 1191 . . . in its explanation of the law

on permissive inferences and the burden of proof." (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 87.)

Appellant attempts to distinguish *Reliford* on the ground that *Reliford* did not present the issue presented here, "which is that . . . CALCRIM 1191 permits the jury to find a defendant guilty based solely on his propensity to offend as distinguished from his prior conduct."

The problem with appellant's argument is that the instruction nowhere tells the jury it may rest a conviction solely on evidence of a defendant's propensity to commit sexual offenses. Further, nothing in the instructions authorizes the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed prior uncharged misconduct.

CALCRIM No. 1191 allows the jury to conclude from the uncharged conduct evidence that the defendant was disposed to commit sexual offenses and, therefore, *likely* committed the current offenses. Nevertheless, CALCRIM No. 1191 cautions the jury that it is not required to draw these conclusions and, despite appellant's attempt to argue otherwise, such a conclusion is insufficient, alone, to support a conviction.

Furthermore, the trial court in this instance specifically instructed the jury that "[a] defendant in a criminal case is presumed to be innocent" and that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal . . . ." We are convinced that no reasonable juror would interpret the language of CALCRIM No. 1191 in the manner suggested by appellant.

*CSAAS Evidence*

The prosecutor moved in limine to admit expert testimony by Carl Lewis, an investigator with the District Attorney's office regarding CSAAS. Although defense counsel brought a motion entitled "Motion to Exclude Expert Testimony On Subject of Child Sexual Abuse Accommodation Syndrome," the motion did not specifically contest the admissibility of such evidence. Rather the motion sought to limit its use and

requested that the court admonished the jury as to its limited admissibility. In accordance with the written motion, defense counsel argued that if the evidence was admitted, it should be general, without focus on the victims in this particular case, and with instruction on how to apply the testimony.

Specifically, when the issue came up during discussions in limine, the court addressed defense counsel and stated, "I appreciate Mr. Schwartz, you are objecting to Carl Lewis being called and testifying as an expert in [the CSAAS] area; correct?" Defense counsel replied, "Well . . . ." He continued, "I would qualify that, Your Honor. I would ask that if Carl Lewis is allowed to testify as an expert witness, his testimony be limited in the sense that the jury is instructed on how to apply his testimony. [¶] Now, I first want to remark by stating that I don't have a statement from Carl Lewis, so I don't know what he's going to say. But speaking with counsel, I understand that he's going to be speaking about generally. He has not interviewed the two victims in this case and he's not speaking case specifically. So if counsel could, correct me if I'm wrong, but my argument is that if he's allowed to testify, the jury be instructed as to how to use his testimony. [¶] The problem is that child sexual abuse accommodation syndrome should not be used as a credibility bolster or booster. It should not be used to validate whether somebody has been sexually abused or not, but -- and I think even Dr. Summit in his paper describes that the syndrome is used, assuming that the child has been abused sexually, and then explains the inconsistent behavior that the child would exhibit once he's been sexually abused, for example, late reporting, as we would have in this case. [¶] So I would ask that if Mr. Lewis testified regarding the syndrome, that the jury be instructed as to how the syndrome should be properly used according to the cases that I cited."

The court asked defense counsel if credibility would be an issue with both victims and defense counsel confirmed that it would be. The court assured counsel that if Mr.

Lewis qualified as an expert witness, testifying generally, the court would admonish the jury with the appropriate CALCRIM instruction.

Subsequently, Carl Lewis was qualified as an expert, testified generally about CSAAS and told the jury he had not interviewed any of the witnesses in the case, nor did he know the details or specific facts about the case. Before Mr. Lewis testified, the court admonished the jury, "You will be hearing testimony from Carl Lewis regarding Child Sexual Abuse Accommodation Syndrome. Carl Lewis's testimony about Child Sexual Abuse Accommodation Syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not [C.] or [D.] [Doe] 's conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of their testimony."

Now appellant contends that over defense objection, the trial court erred in permitting Mr. Lewis to testify, and that the cumulative effect of this error was prejudicial.

Despite the title that defense counsel gave to his written in limine motion, it is quite apparent to this court that defense counsel did not object to Mr. Lewis's testimony being admitted, but rather sought only to have the jury instructed as to its limited admissibility. Nowhere in his written motion did defense counsel argue that the evidence was inadmissible.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." (Evid. Code, § 353.) The objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the

evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

In this case the record does not show that defense counsel fairly informed the trial court that he objected to the CSAAS evidence being admitted. Therefore, we agree with the Attorney General that appellant has forfeited any claim of prejudice from the trial court's admission of this evidence.[12]

*Right to Present a Defense*

Appellant contends that he was denied the right to present a defense when the trial court precluded him from presenting testimony by a defense investigator offered to impeach D.'s mother regarding her knowledge that other victims of appellant's sexual abuse had obtained money damages from civil actions brought after appellant was convicted in their cases.

*Background*

Defense counsel sought to impeach the testimony from D.'s mother concerning when she learned that appellant's other victims had received money judgments, with testimony from his investigator. Counsel made the following offer of proof: "Well, in an attempt to narrow and focus what I really want to get him to testify to, and this goes right to the heart of our defense, he will testify that [D.'s mother] told him that after her sons disclosed they were being molested by Mr. King, she got on the Internet and Googled Mr.

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[12] Even if this court addressed the issue, we find that the evidence was properly admitted. "[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) CSAAS testimony is admissible "for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393.) As in this case, if a child significantly delays in reporting the abuse CSAAS testimony may be appropriate. (*Id.* at p. 394.) Furthermore, as happened here, "the jury must be instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Ibid.*)

King and learned about a previous monetary settlement against him. [¶] She testified differently. She said, I never knew anything about a lawsuit with monetary damages. She said she didn't know about that, but yet she's testified—strike that. She's telling the investigator that back in 2004 she did know about it, and that's really all I want the investigator to testify to."

The prosecutor pointed out that the defense investigator's report was not consistent with defense counsel's offer of proof. The prosecutor explained, "What the statement says, it says—I began by asking [D.'s mother] when she first heard about the court case involving the church. She said it was 2004. . . . [¶] . . . [D.'s mother] explained that she had observed some strange behavior by her younger son. When she questioned him about it, her older son told her about being molested by Mr. King. Before this she was unaware of the court case involving Mr. King. Later, after talking to the District Attorney, she Googled Mr. King and learned of a previous monetary settlement against Mr. King. That's not inconsistent." [13]

The trial court precluded the testimony under Evidence Code section 352. The court found that even if the Google statement was inconsistent, the defense investigator's testimony was marginally relevant and had little probative value because D.'s mother was not a victim; there had been testimony about civil lawsuits; and testimony from D. and his mother that they had not initiated a civil lawsuit, nor did they intend so to do. The court stated that it appreciated the importance of the defense being allowed to call defense witnesses and present a defense, but "under all the circumstances" the court would grant the prosecution's request to preclude the defense investigator from testifying.

Even though a trial court's discretionary power to exclude evidence under Evidence Code section 352 "must yield to a defendant's due process right to a fair trial

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[13] At this point, the prosecutor discovered that his copy of the investigator's report was different from the defense copy. The prosecutor indicated that the difference in reports was not material and defense counsel made no record to contradict this assertion.

and to the right to present all relevant evidence of *significant* probative value to his or her defense" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999), a discretionary ruling under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Evidence Code section 1235 provides as follows: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." In turn, Evidence Code section 770 provides, "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

Thus, "[a] statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219, fn. omitted.)

We set forth in detail the testimony from D.'s mother, which is at the root of appellant's argument. Here, D.'s mother testified on direct examination that after she found out that her sons had been molested, she tried to find out what was going on in San Jose. She telephoned some people from church to see if anybody knew anything and then she "Googled" Mr. King. This Internet search revealed that appellant had been convicted

of child molestation. Thereafter, she reported that her sons had been molested to the San Jose Police Department. This was in 2004.

Thereafter, D.'s mother testified that she had not filed a civil lawsuit against appellant, the church or the Pathfinders' organization, nor had her sons. The prosecutor asked D.'s mother if she was aware of anyone receiving any type of award or settlement or financial compensation because appellant had molested them. D.'s mother replied, "No."

Thereafter, on cross-examination, defense counsel asked D.'s mother whether she recalled her testimony about Googling appellant's name. D.'s mother stated that she did. Defense counsel asked her if that event happened before or after she called the San Jose Police Department. D.'s mother said she could not remember. Defense counsel pressed D.'s mother to explain when she did the Internet search. Again, she said she could not remember, but admitted that when she conducted the search she found out that appellant had been convicted of molesting other boys. Defense counsel asked D.'s mother if at the time she conducted her Internet search she found out that other boys that claimed to have been molested by appellant had received money from lawsuits. D.'s mother replied, "I didn't have all of that information." Then defense counsel asked, "Did you ever find out that these other boys that claimed to have been molested by Mr. King received money from the lawsuit?" D.'s mother replied, "I might have read that on the Google. I'm not sure." When defense counsel asked D.'s mother when she read this on Google, the court sustained the prosecutor's objection on the ground that defense counsel was misstating the testimony. Thereafter, the prosecutor asked D.'s mother, "Did you learn that other young men had received monetary settlements after Mr. King had been convicted of molesting them?" D.'s mother replied, "I believe I heard something about it." When asked from whom did she hear this information, D.'s mother replied, "I don't remember. It was a bad time." Defense counsel continued to press for an answer to his question of whether D.'s mother had heard the information. D.'s mother stated, "It is running through

my mind. I vaguely heard something. That was not where my mind was at the time, worrying about who got paid." Defense counsel continued, "My question . . . is did you hear about it?" D.'s mother confirmed that she had heard about the money judgment. Then, defense counsel asked D.'s mother "Did you hear about that before you went to the police with your sons to report their alleged molest by Mr. King?" D.'s mother responded, "I don't remember." Later defense counsel asked D.'s mother, "isn't it true that coming forward when your sons report their molest has to do with collecting money from a lawsuit?" D.'s mother denied that was her motivation.

Thus, as the foregoing demonstrates, our examination of the record discloses no reasonable basis for a belief that the testimony D.'s mother gave at trial was inconsistent with that which she gave to the defense investigator. The statements she made on cross examination ("I believe I heard something about it";"It is running through my mind. I vaguely heard something. That was not where my mind was at the time, worrying about who got paid"; and "I don't remember" [when she heard the information]) were not inconsistent with the defense investigator's report.[14]

Moreover, according to the defense investigator's report, D.'s mother told him that she conducted the Google search *after* she spoke with the District Attorney, that is, after the crime was reported. Thus, even if her testimony was inconsistent with the defense investigator's report (which it was not), the timing of the discovery of the money judgments was of no relevance since the evidence offered for impeachment demonstrated that D.'s mother did not know of a potential civil discovery before she reported the sexual assaults to the police.[15] Ergo, she had no motive to report the sexual assaults before she

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[14] In fact D.'s mother impeached herself by testifying on direct examination that she was not aware of anyone receiving any monetary compensation because appellant had molested them, but then admitting on cross-examination that she had heard "something about it."

[15] "Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'

went to the police. Accordingly, we conclude that the trial court's decision to exclude the defense investigator's testimony was not arbitrary, capricious, or patently absurd. In short, the trial court did not err in granting the prosecution's motion to prevent the defense investigator from testifying.

Although "[f]ew rights are more fundamental than that of an accused to present witnesses in his [or her] own defense," the right to present a defense is not unlimited. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038].) A trial court retains wide latitude to exclude evidence that is repetitive or only marginally relevant or poses an undue risk of prejudice or confusion of the issues. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690 [106 S.Ct. 2142].)

" 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Since the trial court did not abuse its discretion in applying well-established and reasonable rules of evidence to exclude the proposed testimony of the defense investigator, no constitutional violation occurred.

Accordingly, we reject appellant's contention that he was denied the opportunity to present a meaningful defense.

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(Evid. Code, § 210.) ' "The test of relevance is whether the evidence tends, 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." ' [Citation.]" (*People v. Wilson* (2006) 38 Cal.4th 1237, 1245.) It is well settled that only relevant evidence is admissible. (Evid.Code, §§ 210, 350.) The trial court lacks discretion to admit irrelevant evidence. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

*The Upper Term Sentence*

Appellant claims that under *Cunningham v. California, supra,* 549 U.S. 270 (*Cunningham*), the trial court erred by imposing the upper term on count two.

The court sentenced appellant to the upper term relying on four factors: appellant took advantage of a position of trust, the manner in which the crimes were carried out indicated planning and sophistication, the victim was particularly vulnerable, and appellant's "sexually assaultive behavior" presented a serious danger to society. Appellant argues that none of these facts were found by a jury beyond a reasonable doubt, and therefore, imposition of the upper term denied him due process and a jury trial.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (120 S.Ct. 2348), a New Jersey hate-crime statute authorized a 20-year sentence, despite the usual 10-year maximum, if the sentencing judge found the crime was committed for a specified purpose. In invalidating the statutory scheme, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

Subsequently, in *Blakely v. Washington* (2004) 542 U.S. 296, the high court stated the following. "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Id.* at pp. 303-304.)

In *Cunningham, supra*, 549 U.S. 270, the court applied *Apprendi* and its progeny to California's sentencing scheme. The court stated: "California's determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does. [¶] As this Court's decisions instruct, the Federal Constitution's jury-trial right guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.] . . . In petitioner's case, the jury's verdict alone limited the permissible sentence to 12 years. Additional factfinding by the trial judge, however, yielded an upper term sentence of 16 years. . . . [T]he four-year elevation based on judicial fact-finding denied petitioner his right to a jury trial." (*Id.* at pp. 274-275.)

Appellant is mindful of the fact that in *People v. Black* (2007) 41 Cal.4th 799, 813, the California Supreme Court held that if there is a single *Cunningham* compliant factor available at sentencing upon which to base the imposition of the upper term, then no *Cunningham* violation is present and no remand is required. Further, appellant concedes, albeit grudgingly, that there is one factor here, his prior conviction for embezzlement, which he admitted at trial. Nevertheless, he asserts that it is questionable whether the prior grand theft conviction was a sufficient aggravator under California law to justify the imposition of the upper term. Even if this court agreed with appellant, we would not find that his upper term violated *Cunningham*.

Following *Cunningham* the Legislature amended Penal Code section 1170, subdivision (b), effective March 30, 2007, as urgency legislation (Stats.2007, ch. 3, § 3),

to eliminate the statutory presumption for the middle term and, instead, to grant the trial court full discretion to impose the upper, middle or lower term. (§ 1170, subd. (b).)[16]

Thus, at the time of appellant's sentencing on April 28, 2008, Penal Code section 1170 read "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." Since the trial court sentenced appellant pursuant to the new statute, the upper term was the statutory maximum under *Cunningham* and the trial court was no longer required to find any facts in order to impose the upper term. (See *People v. Sandoval*, *supra*, 41 Cal.4th 825, 843-845 (*Sandoval*).) Thus, his reliance on *Cunningham* is misplaced.

The *Sandoval* court held it is constitutionally appropriate to apply the amended version of the DSL in all sentencing proceedings conducted after the effective date of the amendments, regardless of whether the offense was committed prior to the effective date of the amendments. (*Id.* at pp. 845-857.) We are bound by *Sandoval*. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

Nevertheless, even though the trial court has broad discretion under the amended sentencing scheme, sentencing decisions are still subject to review for abuse of discretion. (*Sandoval*, *supra*, 41 Cal.4th at p. 847.)

The trial court was entitled to impose the upper term based on any significant aggravating factor, unless an exception applied. The record, as set out in the statement of facts, amply supports the court's exercise of discretion in finding four statutorily-recognized aggravating factors -- victim vulnerability, the manner in which the crimes

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[16] The Legislature adopted "*Cunningham's* suggestion that California could comply with the federal jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

were carried out indicated planning and sophistication, appellant took advantage of a position of trust, and appellant's sexually assaultive behavior presented a serious danger to society. (Cal. Rules of Court, rule 4.421(a)(3), (8), (11)& (b)(1).)[17] On the other hand, there is little in the record supportive of mitigation. The discretionary upper term sentence imposed was not an abuse of discretion.

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[17] At first glance, the fourth factor upon which the court relied, appellant's sexually assaultive behavior presented a serious danger to society, does not appear to fit within the category, "[t]he defendant has engaged in violent conduct that indicates a serious danger to society" (Cal. Rules of Court, rule 4.421(b)(1)) where, as here, there was no evidence of force or violence. However, in 1995, the Legislature enacted the Sexually Violent Predators Act. (Welf. & Inst. Code, § 6600 et seq.) Under the Act, when someone convicted of specified " '[s]exually violent offense[s]'. . . committed by force, violence, duress, menace, [or] fear of immediate and unlawful bodily injury on the victim or another person" (Welf. & Inst. Code,§ 6600, subd. (b)), against two or more victims completes his prison sentence and becomes eligible for parole, the People can petition the trial court to have that person declared a Sexually Violent Predator if he "has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior." (Welf. & Inst. Code, §§ 6600, subd. (a), 6601.)

In 1996, the Legislature added Welfare and Institutions Code section 6600.1 to the Act. At the time, subdivision (a) of that section stated: "If the victim of an underlying offense *that is specified in subdivision (b) of Section 6600* is a child under the age of 14 and the offending act or acts involved substantial sexual conduct, the offense *shall* constitute a 'sexually violent offense' for purposes of Section 6600." (Emphasis added.) Both Penal Code sections 288 and 288.5 can be found in Welfare and Institutions Code section 6600, subdivision (b). In 2006, the Legislature removed the language concerning substantial sexual conduct and left Welfare and Institutions Code section 6600.1 to read "If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14, the offense shall constitute a 'sexually violent offense' for purposes of Section 6600. Thus, by this definition, a violation of Penal Code section 288.5 or 288, with a sustained allegation of the victim being under 14 years old, is a sexually violent offense bringing appellant's conduct within the factor— the defendant has engaged in violent conduct that indicates a serious danger to society.

*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.